STATE OF MICHIGAN

COURT OF APPEALS

CENTRAL CONTRACTING, INC.,

Plaintiff-Appellant,

v

J.R. HEINEMAN & SONS, INC., and DENNIS RHEM,

Defendant-Appellee.

UNPUBLISHED
November 18, 2004

No. 247800
Saginaw Circuit Court
LC No. 01-041218-CH

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for a directed verdict of plaintiff's claims for breach of an express or implied contract, breach of quasi-contract, misrepresentation or fraud, two counts of tortious interference with a business relationship or economic advantage, civil conspiracy, and intentional infliction of emotional distress. We affirm.

Plaintiff, a subcontractor, bid numerous jobs with defendant J.R. Heineman, a general contractor, over the course of approximately ten years. At some point during the relationship, plaintiff stopped obtaining contracts from J.R. Heineman. Plaintiff alleged that J.R. Heineman and one of its owners, Dennis Rhem, began selling plaintiff's bid numbers to competing subcontractors in order to solicit lower bid numbers from those subcontractors. At trial, Donald Hesse, one of plaintiff's owners, and his brother, Ronald, testified about numerous jobs (hereinafter referred to as the "challenged jobs"), which allegedly were sold from underneath plaintiff through the alleged bid-selling scheme.

Hesse testified that he believed that plaintiff's bids were confidential before the bidding deadline. Although he claimed that the written invitations to bid that plaintiff received from J.R. Heineman contained confidentiality language, he failed to produce any written invitations that contained confidentiality language, and he admitted that he never discussed bid confidentiality with anyone from J.R. Heineman. With respect to the challenged jobs, plaintiff was unable to offer any specific or documentary evidence to support the amount of its alleged bids. Plaintiff apparently threw away all of its paperwork related to the amount of the alleged bids. Hesse's testimony about the alleged bid amounts for the challenged jobs was couched in terms of probabilities, guesses, and approximations. Only one of the challenged jobs was supported with any specific evidence. There was evidence that Tri-City Kontracting, one of defendant's

competitors, knew plaintiff's bid number before the bid deadline on the Saginaw Juvenile Home job. However, contrary to plaintiff's theory of the case, the evidence established that Tri-City Kontracting actually bid higher than plaintiff.

I

Plaintiff first argues that reversal is required because the trial court granted defendants' motion for a directed verdict without stating the applicable standard of review or identifying the deficiencies in the plaintiff's proofs. We disagree.

MCR 2.515 provides:

> A party may move for a directed verdict at the close of the evidence offered by an opponent. The motion must state specific grounds in support of the motion. If the motion is not granted, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury, even though all parties to the action have moved for directed verdicts.

Defendants presented the trial court with a written motion for a directed verdict at the close of plaintiff's proofs at trial. Defendants' motion set forth specific arguments in support of their position that a directed verdict was appropriate for each count of plaintiff's complaint. The trial court subsequently heard extensive argument on the motion. Thus, it is apparent that the trial court was aware of the facts of the case and the arguments of the parties. Further, it is presumed that the trial court knew and followed the applicable law. See *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971) (absent proof to the contrary, trial judges are presumed to follow the law). The trial court was not required to make any specific findings. MCR 2.517(A)(4) provides that, "[f]indings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." Plaintiff cites no particular rule that required the trial court to state its findings and conclusions, or to expressly articulate the applicable standards of review and failure of plaintiff's proofs. More importantly, our review is de novo. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). Thus, our decision is not contingent on the trial court's underlying analysis.

In its first issue on appeal, plaintiff presents two additional arguments. The first relates to the trial court's refusal to allow plaintiff's proposed expert to testify about future lost profits. This issue was not raised in the statement of the questions presented and, therefore, is not properly before this Court. *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997). Additionally, the issue is briefed in a cursory fashion, and plaintiff fails to explain or rationalize its position that the trial court improperly denied it the opportunity to call its expert. Plaintiff also fails to cite any relevant authority in support of its argument. A party may not announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000). Therefore, the issue is abandoned.

The second additional argument raised in plaintiff's first issue relates to plaintiff's proof of lost profit damages for the challenged jobs. Again, this issue was not raised in the statement

of the questions presented and review is not appropriate. *Weiss, supra.* However, because the issue is dispositive of other issues raised on appeal, we will consider it.

The trial court ordered, and plaintiff does not challenge, that lost profit damages were the only damages that plaintiff was entitled to seek at trial with respect to its contract claims. A plaintiff must establish proof of lost profits with a reasonable degree of certainty. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 175-176; 568 NW2d 365 (1997); *In the matter of MCI Telecommunications Corp,* 240 Mich App 292, 315; 612 NW2d 826 (2000). See also *Poirier v Grand Blanc Twp,* 192 Mich App 539, 549; 481 NW2d 762 (1992). A jury should not be allowed to speculate or guess on the amount of lost profits. *Joerger, supra*.

In this case, Hesse was unsure of the bid amounts for the challenged jobs. He phrased his responses to questions about the bid amounts in terms of his beliefs, approximations, or guesses. For some of the challenged jobs, he gave a range of numbers, which varied by substantial sums, e.g., $300,000 to $400,000. At one point during his testimony, he candidly admitted that, "[o]n these numbers, I'm not stating that I'm positive." With the exception of this equivocal testimony about the alleged bids, there was no evidence to support the bid amounts. The only exception was the Saginaw Juvenile Home job for which *defendants* produced evidence that plaintiff bid $66,500, plus $8,500 for a water line.

Moreover, and more significantly, testimony about the amount of profit expected for each job was lacking. Hesse's brother, Ronald, testified that plaintiff liked to maintain a fifteen percent profit margin. Hesse testified that plaintiff ideally liked its bids to include a twenty-five percent margin. He made clear, however, that plaintiff sometimes bid jobs at cost, meaning that no profit was to be made. The profit margins changed depending on the circumstances. Hesse admitted that many of the challenged jobs were bid at cost, but he was not sure which ones. At trial, he specifically testified that, in order to testify about the amount of profit lost on each of the challenged jobs, he would "have to study that deeply." Clearly, Hesse was unable to offer testimony at trial with respect to the anticipated profit margins for each of the challenged jobs. The only job for which reasonably specific testimony was offered to establish the anticipated profit margin was the Saginaw Juvenile Home. With respect to that job, plaintiff admitted that it did not anticipate generating any profit at all.

As previously discussed, before lost profits are recoverable, they must be proven with a reasonable degree of certainty as opposed to being based on mere conjecture or speculation. *MCI Telecommunications, supra; Joerger, supra*. On the basis of the evidence and testimony offered, the jury would have had to engage in speculation and guesswork to determine the lost profits for the challenged jobs. Lost profit damages were therefore not recoverable. Plaintiff's claim on appeal, that it produced sufficient evidence of lost profits to enable a jury to calculate damages, is without merit.

II

Plaintiff next argues that the trial court erred in granting a directed verdict on its express, implied, and quasi-contract claims. Plaintiff was only seeking lost profit damages on these contract claims. Because plaintiff could not establish damages attendant to those claims, a directed verdict was appropriate. See *Vandendries v General Motors,* 130 Mich App 195, 198-

199; 343 NW2d 4 (1983) (a directed verdict may be affirmed where the proofs regarding damages are highly speculative).

We additionally conclude that plaintiff has abandoned its arguments that the proofs at trial were sufficient to submit the breach of express contract and the breach of quasi-contract claims to the jury. *Caldwell, supra.* Further, we conclude that plaintiff's breach of implied contract claim was not viable even without consideration of the issue of damages. Plaintiff claims that there was an implied contract to keep its bids confidential. An implied contract exists where one engages or accepts beneficial services of another for which compensation is customarily made and naturally anticipated. *Elliott v Dep't of Social Services,* 124 Mich App 124, 131; 333 NW2d 603 (1983). The acts of soliciting bids and submitting bids are not acts for which compensation is customarily made or naturally anticipated. More importantly, an implied contract must satisfy the elements of mutual assent and consideration. *Pawlak v Redox Corp,* 182 Mich App 758, 765; 453 NW2d 304 (1990); *Mallory v Detroit,* 181 Mich app 121, 127; 449 NW2d 115 (1989). Valid consideration cannot be presumed merely because two parties received benefit from each other. *Higgins v Monroe Evening News,* 404 Mich 1, 20; 272 NW2d 537 (1978). Rather, there must be a bargained-for exchange. *Id.* In this case, there was no evidence that the parties bargained for a contract to keep the bids confidential. Thus, the implied contract claim fails for want of consideration to contract to keep the bids confidential. An express contract would fail on the same grounds. *Thomas v Leja,* 187 Mich App 418, 422; 468 NW2d 58 (1991) (legal consideration is an essential element of a valid contract).

III

Plaintiff next argues that the evidence was sufficient to submit its fraud or misrepresentation claim to the jury. Relying on SJI2d 128.04, plaintiff argues that the evidence was sufficient to establish innocent misrepresentation. To prove a claim of innocent misrepresentation, it is necessary to prove that the plaintiff and the defendant were in privity of contract. *Forge v Smith,* 458 Mich 198, 212; 580 NW2d 876 (1998). The record here does not support that plaintiff and defendant were in privity. Therefore, a claim of innocent misrepresentation was not established as a matter of law. A directed verdict on that claim was appropriate.

We further note that, with respect to this claim, plaintiff argues that it established lost profit and future lost profit damages. As previously discussed, plaintiff's lost profit damages were not supported by the speculative evidence. Recovery for speculative damages is not permitted in a tort action. *Law Offices of Lawrence J Stockler, PC v Rose,* 174 Mich App 14, 33; 436 NW2d 70 (1989). Moreover, the record is devoid of any evidence to support future lost profits.

IV

Defendant next challenges the trial court's grant of a directed verdict on the tortious interference claims alleged against defendants Rhem and J.R. Heineman. We conclude that the trial court's decision was appropriate.

> [A] claim of tortious interference with a contract or a prospective economic advantage is complete upon a showing of the existence of a valid

> business relationship or the expectation of such a relationship between the plaintiff *and some third party*, knowledge of the relationship or expectation of the relationship by *the defendant*, and an intentional interference causing termination of the relationship or expectation, resulting in damages to the plaintiff. [*Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 254; 673 NW2d 805 (2003) (citations omitted; emphasis added).]

See also *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003); *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). "To maintain a cause of action for tortious interference, the plaintiffs must establish that the defendant was a 'third party' to the contract or business relationship." *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993), citing *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986).

Plaintiff's claim against J.R. Heineman does not involve a third party. Plaintiff did not allege or argue that J.R. Heineman interfered with its relationship with any other general contractors to which plaintiff submitted bids. In fact, Hesse agreed that J.R. Heineman did not interfere in its other relationships. Plaintiff's claim is essentially that J.R. Heineman interfered with plaintiff's business relationship with J.R. Heineman. Such a claim is not actionable.

Plaintiff's claim against Rhem also fails. Rhem was an owner of J.R. Heineman and was its vice president. It is well settled that "corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed, supra*. In this case, there was no proof that Rhem was acting strictly for his own personal benefit. It was undisputed that, if Rhem sold the low bid in order to solicit lower bids, this benefited J.R. Heineman directly. Use of the lowest possible subcontracting bid kept J.R. Heineman's bid lower as the general contractor. Plaintiff acknowledges this throughout its arguments on appeal. We note that plaintiff also generally claims that Rhem engaged in work slow downs and created other problems on job sites, which interfered with plaintiff's relationship with J.R. Heineman. The evidence, viewed in a light most favorable to plaintiff, indicated that Rhem caused trouble at only one project, the South Side Health Center. There was no evidence, however, that Rhem did this for his personal benefit. More importantly, as with the other claims on appeal, there was an absence of sufficient testimony with respect to damages to support a recovery on that claim. Thus, a directed verdict was properly granted.

V

Finally, defendant challenges the grant of a directed verdict on its civil conspiracy claim. "A conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means." *Cousineau v Ford Motor Co*, 140 Mich App 19, 36-37; 363 NW2d 721 (1985). It is well settled that a claim for civil conspiracy, standing alone, is not actionable. *Id.*, 37. The claim cannot "exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), lv gtd 470 Mich 881 (2004), quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). In other words, a civil conspiracy claim may not be maintained where there are no legal and equitable claims remaining in the case. See *Detroit Bd of Ed v Celotex Corp*, 196 Mich App 694, 713; 493 NW2d 513 (1992). Because

plaintiff failed to establish any viable, underlying tort, its conspiracy claim fails as a matter of law. Therefore, the trial court properly granted a directed verdict on this claim.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra